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NORTHERN DISTRICT OF CALIFORNIA

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6 **UNITED STATES DISTRICT COURT**
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9 **NORTHERN DISTRICT OF CALIFORNIA**
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11 ASIS INTERNET SERVICES, a California corporation, and JOEL HOUSEHOLDER, dba KNEELAND ENGINEERING, dba FOGGY.NET) Case No.: C-08-3186-EDL
12 Plaintiffs,) OPPOSITION TO MOTION FOR DEFAULT
13 vs.) JUDGMENT AND MOTION TO SET ASIDE
14 RICHARD RAUSCH, MARK THEIS, AND KIRK WHITING, EDWARD HECKERSON.) DEFAULT AGAINST EDWARD
15 Individually and ficticiously doing business as FIND A QUOTE,) HECKERSON
16 Defendants.)
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19 COMES NOW Defendant EDWARD HECKERSON, by and through his attorney
20 Thomas C. Cook, Esq., and moves the Court for an Order Setting Aside the Default and any
21 Default Judgment entered against Defendant EDWARD HECKERSON.

22 This Motion is made and based upon the attached Memorandum of Points and
23 Authorities, all pleadings, papers, records or other documents on file herein, and upon such oral
24 and/or documentary evidence as may be presented at the time of the hearing of this Motion.

25 DATED this 24th day of June, 2009.

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6 By: 

7 Thomas C. Cook, Esq.
8 State Bar No. 168570
9 500 N. Rainbow Blvd., Suite 300
10 Las Vegas, Nevada 89107
11 Attorney for Defendant Edward Heckerson

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INTRODUCTION

20 The instant matter was purportedly served on Edward Heckerson at a business location
21 listed at 2920 N. Green Valley Parkway, Henderson, Nevada 89014. However, Mr. Heckerson
22 has not maintained an office there for at least two years. Further, service was accepted by an
23 employee of the management company of those office suites, who did not forward the Summons
and Complaint to Mr. Heckerson. Finally, Plaintiffs were actually aware of Mr. Heckerson's
actual office address, as it appears in Exhibit F to the First Amended Complaint (see Exhibit 2).

Defendant Edward Heckerson was first made actually aware of the Summons and
Complaint on or about March 24, 2009 when the undersigned counsel for Mr. Heckerson
received a package from Plaintiff's counsel containing the Entry of Default and the First
Amended Complaint.

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POINTS AND AUTHORITIES

A. **Service of Process Not Proper Under FRCP Rule 4(e)**

1 Federal Rule of Civil Procedure 4(e) provides the manner in which an individual within a
2 judicial district of the United States is to be served a Summons and Complaint. FRCP 4(e) states
3 as follows:

4 “(e) Serving an Individual Within a Judicial District of the United States.

5 Unless federal law provides otherwise, an individual, other than a minor, an incompetent
6 person, or a person whose waiver has been filed, may be served in a judicial district of the United
7 States by:

8 (1) following state law for serving a summons in an action brought in courts of general
jurisdiction in the state where the district court is located or where service is made; or

9 (2) doing any of the following:

10 (A) delivering a copy of the summons and of the complaint to the individual personally;

11 (B) leaving a copy of each of the individual's dwelling or usual place of abode with someone of
suitable age and discretion who resides there; or

12 (C) delivering a copy of each to an agent authorized by appointment or by law to receive service
of process.”

13 In this case, none of the above procedures were followed in the purported service on Mr.
14 Heckerson. Service was left at an office suite in which Mr. Heckerson had not maintained an
15 office for at least two years. While California law does allow for personal service to be left at
16 the defendant's office during normal business hours (see California Code of Civil Procedure
17 415.20(a)), the fact is that the address served, i.e. 2920 N. Green Valley Parkway, Henderson,
18 Nevada, was not Mr. Heckerson's business address, nor was it for at least two years. Further,
19 Nevada law does not provide for personal service at a business address (see Nevada Rules of
20 Civil Procedure 4(d)(6)). Finally, since process was not served on Mr. Heckerson personally,
21 was not left at his dwelling or usual place of abode, and was not left with any authorized agent,
22 then no effective service was ever served on Mr. Heckerson.
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1 **B. Default and any Default Judgment Should Be Set Aside Pursuant to FRCP 60**

2 Federal Rule of Civil Procedure 60(b) provides for the Court to relieve a party from a
3 Judgment, as follows:

4 **“(b) Grounds for Relief from a Final Judgment, Order, or Proceeding**

5 On motion just terms, the court mat relieve a party or it's legal representative from a final
6 judgment, order, or proceeding for the following reasons:

- 7 (1) mistake, inadvertence, surprise, or excusable neglect;
- 8 (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in
9 time to move for a new trial under Rule 59(b);
- 10 (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by
11 an opposing party;
- 12 (4) the judgment is void;
- 13 (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment
14 that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- 15 (6) any other reason that justifies relief.”

16 It is axiomatic that the policy and interest of this District’s Courts is for the judicial system to
17 hear cases on their merits, and not to enter judgments in absentia; nor is it the policy of this
18 District’s judicial system to enforce a default judgment where there is an express desire and
19 intent to defend on the merits. Moreover, the Summons and First Amended Complaint was filed
20 by the Plaintiffs on January 15, 2009. The Federal Rules of Civil Procedure provide that in any
21 case, a plaintiff would ordinarily have 120 days, for purposes of serving summons and complaint
22 on a defendant. Yet, this case has gone from filing to judgment in little over half the time
23 permitted by the rules for service of process. With this entire case approximately three months
24 old, setting aside a default judgment and permitting this Defendant to answer the allegations
25 made against it is preferable to upholding a default. Especially herein, where it appears that the

1 alternative would be for this Court to uphold the entry of a default judgment against Defendant
2 Heckerson in an amount in excess of \$13,000,000. Such a result would be unconscionable.

3 In determining whether there has been compliance with Rule 60, it has been held that the
4 court may relieve a party from a final judgment on grounds of mistake, inadvertence, surprise, or
5 excusable neglect when the following factors are apparent, as these indicate compliance with the
6 requirements of the rule: (1) A prompt application to remove the judgment; (2) absence of an
7 intent to delay the proceedings; (3) a lack of knowledge of procedural requirements; and (4)
8 good faith. See Yochum v. Davis, 98 Nev. 484, 653 P.2d. 1215 (1982). Given the above,
9 Defendant Heckerson asserts that all of the factors are met. There is no intent to delay these
10 proceedings, and, indeed the facts evidence the contrary. It is Defendant Heckerson's desire to
11 defend on the merits, and has filed this application less than 30 days after the Default was
12 granted (which was granted less than 90 days after the Summons and First Amended Complaint
13 was originally filed). Defendant, not being an attorney, had no knowledge of procedural rules.
14 Finally, this application to set aside the Default and any Judgment by Default is made in good
15 faith. The facts clearly indicate that the Defendant retained counsel to defend this case promptly
16 after actually learning of this matter, and that the Defendant has a clear and patently obvious
17 desire to defend this case on the merits.

18 An argument can also be made that this Default should be set aside under FRCP 60(b)(3).
19 According to Plaintiff's own exhibits, Plaintiffs were well aware of Defendant Heckerson's
20 actual business address of 500 N. Rainbow Blvd., Suite 300, Las Vegas, Nevada. However, they
21 purposely chose to deliver service to an address that Defendant Heckerson had not maintained
22 for at least two years, and represent to this honorable Court that they had properly perfected
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1 service. Such conduct clearly rises to the level of fraud, misrepresentation or misconduct as
2 contemplated by Rule 60(b)(3).

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4 **PRAYER**

5 For the foregoing reasons, and based upon the authorities set forth herein, Defendant
6 Edward Heckerson respectfully requests that the Default granted by this Court on March 23,
7 2009, and any subsequent Judgment by Default, be set aside. Service of Process under FRCP 4
8 was clearly not properly perfected, Defendant has met the requirements set forth in Yochum, and
9 FRCP 60(b) explicitly provides for such relief.

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11 DATED this 24th day of June, 2009.

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15 By: 
16 Thomas C. Cook, Esq.
State Bar No. 168570
500 N. Rainbow Blvd., Suite 300
Las Vegas, Nevada 89107
17 Attorney for Defendant Edward Heckerson
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PROOF OF SERVICE

I, Thomas C. Cook, Esq., declare that I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 500 N. Rainbow Blvd., Suite 300, Las Vegas, Nevada 89107.

On June 24, 2009, I served the following document:

**OPPOSITION TO MOTION FOR DEFAULT JUDGMENT AND MOTION TO SET ASIDE
DEFAULT AGAINST EDWARD HECKERSON**

On the parties listed below as follows:

Singleton Law Group
611 "L" Street, Suite "A"
Eureka, CA 95501

Richard Rausch
c/o Bennet G. Kelley
INTERNET LAW CENTER
100 Wilshire Blvd., Suite 950
Santa Monica, CA 90401

KIRK WHITING
540 E. Foothill Blvd.
San Dimas, CA 91773

- By first class mail by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid and placing the envelope in the firm's daily mail processing center for mailing in the United States mail at Las Vegas, Nevada.

(Federal) I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on June 24, 2009 at Las Vegas, Nevada.

Thomas C. Cook, Esq.